CHONG KEW

v.

LEOW LAY & ORS

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABU SAMAH NORDIN JCA
SULAIMAN DAUD JCA
[CIVIL APPEAL NO: A-02-119-2002]
22 AUGUST 2008

CIVIL PROCEDURE: *Res judicata - Issues, similarity of - Delivery of vacant possession of land - Appeal against - Whether doctrine of res judicata applicable*

LAND LAW: *Tenancy - Vacant possession - Appeal against - Issues, similarity of - Res judicata - Whether applicable*

This was an appeal by the plaintiff ('member') against the order of the High Court that the member deliver vacant possession of certain rented land ('land') to the defendant ('association'). The association, the owner of the land, had initially filed a summons in the Magistrates' Court against the member seeking an order for vacant possession by reason of arrears of rental and had issued a notice to quit to the member ('notice'). The member submitted that, in the High Court and the Magistrates' Court, the association had relied on the same notice to recover vacant possession of the land. Since the Magistrates' Court had dismissed the association's claim for vacant possession based on the notice and the association had withdrawn its appeal against that decision, the plea of *res judicata* applied. The association disagreed, contending that the principle of *res judicata* did not apply as the issues before the Magistrates' Court and the High Court were entirely different; the issue in the High Court was in relation to title and final adjudication of the parties' rights whilst that in the Magistrates' Court revolved around tenancy. The trial judge agreed with the association's submission and held that *res judicata* was inapplicable. In the instant appeal, the issue requiring determination was whether the trial judge, in the light of the pleadings in the Magistrates' Court and in the High Court and the relevant finding of facts, was correct in holding that the doctrine of *res judicata* was inapplicable.

Held (allowing the appeal)
Per Low Hop Bing JCA delivering the judgment of the court:

(1) On the facts of the instant case, the association's prayer for vacant possession was against the member as its tenant. This clearly meant that the association's claim was based on its capacity as landlord *ie*, owner of the land when it issued the notice to the member. Hence, the finding by the Magistrates' Court that the notice was bad in law and had no legal effect was, in view of the withdrawal of the appeal by the association, final, conclusive and binding on the association and the member. In the High Court, the association's counterclaim was founded on the title to the land so as to recover vacant possession thereof against the member, clearly in the member's capacity as tenant. Without further ado, the association was relying on the same notice. Therefore, there was absolutely no doubt that in the Magistrates' Court and the High Court, the following issues were identical: (i) the prayer for vacant possession of the land; (ii) the notice to the member to deliver vacant possession; and (iii) the invalidity of the notice. That being the case, the member's plea of *res judicata* was well conceived and justified. *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* (foll). The trial judge had erred in law in holding that the doctrine of *res judicata* was inapplicable. (paras 22, 23, 24, 25, 26 & 27)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini ialah rayuan oleh plaintif ('ahli') terhadap perintah Mahkamah Tinggi bahawa ahli menyerahkan milikan kosong hartanah tertentu yang disewa ('hartanah') ke defendan ('persatuan'). Persatuan tersebut, yang merupakan pemilik hartanah, telah pada mulanya memfail satu saman dalam Mahkamah Majistret terhadap ahli dan menuntut suatu perintah untuk milikan kosong disebabkan tunggakan sewa dan telah mengeluarkan sesuatu notis keluar ke ahli ('notis'). Ahli menghujah bahawa, dalam Mahkamah Tinggi dan Mahkamah Majistret, persatuan telah bergantung pada notis yang sama untuk mendapat milikan kosong hartanah. Oleh kerana Mahkamah Majistret telah menolak tuntutan persatuan untuk milikan kosong berdasarkan notis dan persatuan telah menarik balik rayuannya terhadap keputusan itu, rayuan *res judicata* terpakai. Persatuan tidak bersetuju, dan mendakwa bahawa prinsip *res*

judicata tidak dapat dipakai kerana isu-isu di hadapan Mahkamah Majistret dan Mahkamah Tinggi benar-benar berbeza; isu dalam Mahkamah Tinggi berhubung dengan hakmilik dan penghukuman muktamad mengenai hak-hak pihak yang terlibat sementara isu dalam Mahkamah Majistret berkisar pada penyewaan. Hakim perbicaraan setuju dengan hujahan persatuan dan memutuskan bahawa *res judicata* tidak boleh dipakai. Dalam rayuan ini, isu yang perlu ditentukan ialah sama ada hakim perbicaraan, memandangkan pliding dalam Mahkamah Majistret dan dalam Mahkamah Tinggi dan dapatan fakta yang relevan, memutuskan dengan betul bahawa doktrin *res judicata* tidak dapat dipakai.

Diputuskan (membenarkan rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta kes ini, tuntutan persatuan untuk mililkan kosong ialah terhadap ahli sebagai penyewanya. Ini jelas bermaksud bahawa tuntutan persatuan berasaskan keupayaannya sebagai tuan tanah, iaitu, pemilik hartanah apabila ia mengeluarkan notis kepada ahli. Oleh itu, dapatan oleh Mahkamah Majistret bahawa notis merupakan tidak sah dalam undang-undang dan tidak mempunyai akibat di sisi undang-undang ialah, memandangkan penarikan balik rayuan oleh persatuan, terakhir, muktamad dan mengikat terhadap persatuan dan ahli. Dalam Mahkamah Tinggi, tuntutan balas persatuan diasaskan pada hakmilik ke hartanah supaya boleh mendapat milikan kosong terhadap ahli, jelas dalam keupayaannya sebagai penyewa. Tanpa berlengah-lengah lagi, persatuan bergantung kepada notis yang sama. Oleh itu, tidak ada apa-apa keraguan bahawa dalam Mahkamah Majistret dan Mahkamah Tinggi, isu-isu berikut adalah sama: (i) tuntutan untuk milikan kosong hartanah; (ii) notis ke ahli untuk menyerahkan milikan kosong; dan (iii) ketidaksahan notis itu. Disebabkan itu, rayuan *res judicata* oleh ahli telah dibuat dengan betul dan berjustifikasi. *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* (diikuti). Hakim perbicaraan telah khilaf dalam undang-undang apabila memutuskan bahawa doktrin *res judicata* tidak dapat dipakai.

[Diperintah sedemikian.]

Case(s) referred to:

Andavan v. Thong Nyik Lin [1966] 1 MLJ 57 ***(refd)***
Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(foll)***
Bell v. Holmes [1956] 3 All ER 449 ***(refd)***
Chamberlain v. Deputy Commissioner of Taxation [1988] 62 ALJR 324 ***(refd)***
Conquer v. Boot [1928] 2 KB 336 ***(refd)***
Florence Bailes v. Dr Ng Jit Leong [1983] 2 MLJ 175 HC ***(refd)***
Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***
Hoystead v. Taxation Commissioner [1962] AC 155 ***(refd)***
Lawlor v. Gray [1984] 3 All ER 345 ***(refd)***
LE Walwin & Partners Ltd v. West Sussex County Council [1975] 3 All ER 604 ***(refd)***
Lee Sem Yoong v. Leong Yoong [1967] 2 MLJ 86 ***(refd)***
Public Trustee v. Kenward [1967] 2 All ER 870 ***(refd)***
Re Lim Leng Cheak, Decd; Lim Eow Thoon v. Lim Keng Chuan & Anor [1969] 2 MLJ 228 ***(refd)***
SCF Finance Co Ltd v. Masri & Anor (No 3) [1987] QB 1028 ***(refd)***
Superintendent of Pudu Prison v. Sim Kie Chong [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC ***(refd)***
Yat Tung Investment Co v. Dae Heng Bank & Anor [1975] AC 581 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 40
Moneylenders Ordinance 1951, s. 21

For the appellant - KL Choy; M/s KL Choy & Co
For the respondents - A Iruthaya Raj; M/s Raj Selva & Co

[Appeal from High Court, Ipoh; Civil Suit No: 22-194-91]

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 20 January 2000, the Ipoh High Court allowed the defendant's ("the association's") counterclaim with costs, and ordered the plaintiff ("the member") to deliver to the association vacant possession of the land held under Lot No. 12713 Siputeh Road (which upon subdivision was known as HS(D) Ka. 617/74 Lot 191), in the district of Kinta, Tronoh town ("the land").

[2] The member's appeal is against the order for vacant possession made against him by the High Court.

Factual Background

[3] After a full trial, the factual background as found by the High Court may be unfolded below.

[4] The association, Persatuan Chung Loong, was registered under the Societies Act 1961 and is represented by its trustees.

[5] The association has been the owner of the land since May 1950.

[6] On 28 May 1950, the association passed a resolution authorizing the trustees to subdivide and lease the subdivided lots to members, including the member's father, to erect temporary buildings for a period of not more than five years, by paying a small monthly rental. In the 1960s, the member's father erected a temporary building thereon.

[7] In 1985, pursuant to another resolution of the association, solicitors for the association issued a notice to the member offering him an option to purchase the property at a fixed price. The member had never accepted the offer. The member was meanwhile in arrears of rental.

[8] In 1986, the association filed Ipoh Magistrate's Court summons No. 82-154-1986 against the member seeking an order for vacant possession by reason of arrears of rental. Paragraph 2 of the association's statement of claim averred that the association as owner of the land had issued a notice to quit dated 28 November 1985 ("the notice") requiring the member to deliver vacant possession on or before 31 December 1985. It was duly served on the member.

[9] Paragraph 4 of the member's defence averred that the notice was bad in law and had no legal effect.

[10] The member's defence was upheld by the learned Magistrate. The association's claim for vacant possession based on the notice was dismissed with costs. There was an appeal which was subsequently withdrawn by the association.

[11] In 1991, the member filed a writ in the Ipoh High Court. His claim was founded on a contract, averring that he had bought the land from the association sometime in 1965 for RM1,000.

[12] Included in the association's defence is a counterclaim against the member, praying for vacant possession. Paragraphs 13 and 14 of the association's counterclaim aver that *vide* the notice issued to the member, the association demanded vacant possession of the land from the member. The notice, which appears at p. C86 of the appeal record, is the same notice relied on by the association in the action against the member in the Magistrate's Court.

[13] Paragraph 4 of the member's reply and defence to the association's counterclaim avers to the effect that:

(1) the notice is bad in law and has no legal effect; and

(2) the association's claim for vacant possession has been raised and decided in the Magistrate's Court action against the member, and so the association is by reason of the doctrine of *res judicata* estopped from raising it again in the High Court.

Res Judicata

[14] Learned counsel , Mr. K.L. Choy submitted for the member that, in the High Court and the Magistrate's Court, the association has relied on the same notice to recover vacant possession of the land from the member. Since the Magistrate's Court has dismissed the association's claim for vacant possession based on the notice and the association has withdrawn the appeal against that decision, the plea of *res judicata* applies, citing *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn. Bhd* [1995] 3 MLJ 189 SC.

[15] Mr. A. Iruthaya Raj, learned counsel for the association, disagreed and supported the High Court decision, contending that the principle of *res judicata* does not apply, as the issues before the Magistrate's Court and the High Court were entirely different; and that the issue in the High Court is in relation to title and final adjudication of the rights of the parties, while that in the Magistrate's Court revolves around tenancy. He referred to, *inter alia*:

(a) *Florence Bailes v. Dr. Ng Jit Leong* [1983] 2 MLJ 175 HC;

(b) *Andavan v. Thong Nyik Lin* [1966] 1 MLJ 57 HC;

(c) *Lee Sem Yoong v. Leong Yoong* [1967] 2 MLJ 86 HC; and

(d) *Re Lim Leng Cheak, Decd; Lim Eow Thoon v Lim Keng Chuan & Anor* [1969] 2 MLJ 228 FC.

[16] The learned trial judge agreed with the association's submission and held that *res judicata* is inapplicable.

[17] In the instant appeal, the respective submission by learned counsel and the decision of the learned trial judge had set the scene for the determination of the following question:

> In the light of the pleadings in the Magistrate's Court and in the High Court, and on the above finding of facts, was the learned trial judge correct in holding that the doctrine of *res judicata* was inapplicable?

[18] The answer to the above question may be ascertained by embarking on a detailed discussion of the doctrine of *res judicata*. Peh Swee Chin FCJ (as he then was) in delivering the judgment of the Federal Court in *Asia Commercial Finance, supra,* gave an excellent exposition on this doctrine at pp. 197 to 203, which may be extracted and enumerated as follows:

(i) *Res judicata* simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*;

(ii) When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties who should accept it as the truth – *res judicata pro veritate accipitur;*

(iii) The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium;*

(iv) It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari pro eadem causa;*

(v) Both the aforesaid maxims in (3) and (4) are the rationales for the doctrine of *res judicata,* but the earlier maxim has the further elevated status of a question of public policy;

(vi) Since a *res judicata* creates an estopel *per rem judicatum*, the doctrine of *res judicata* is really the doctrine of estoppel *per rem judicatum* which archaically was described as estoppel by record;

(vii) The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time: per Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 at p. 115; the "point" should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties;

(viii) One of the exceptional special cases is the effect of a default judgment in subsequent proceedings between the same parties because a default judgment is different from a final judgment on the merits;

(ix) The well-known relevancy of a previous judgment in barring a second suit is seen in s. 40 of the Evidence Act 1950, which provides as follows:

> The existence of any judgment, order or decree which by law prevents any court from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether the court ought to take cognizance of the suit or to hold the trial.

(x) There are in fact two kinds of estoppel *per rem judicatum*, the first relates to cause of action estoppel and the second, to issue estoppel, which is a development from the first;

(xi) The cause of action estoppel arises when rights or liabilities involving a particular right to take a particular action in court for a particular remedy are determined in a final judgment and such right of action ie cause of action, merges into the final judgment; in layman's language, the cause of action has turned into the final judgment. The cause of action may not be relitigated between the same parties because it is *res judicata*;

(xii) In order to prevent multiplicity of action and also in order to protect the underlying rationales of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts or issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence; see *Public Trustee v. Kenward* [1967] 2 All ER 870; [1967] 1 WLR 1062: *Conquer v. Boot* [1928] 2 KB 336; *Chamberlain v. Deputy Commissioner of Taxation* [1988] 62 ALJR 324; and *LE Walwin & Partners Ltd v. West Sussex County Council* [1975] 3 All ER 604;

(xiii) Issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, in law, issue estoppel means a lot more, ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties; neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision;

(xiv) Issue estoppel prevents contradiction of a previous determination, whereas cause of action estoppel prevents reassertion of the cause of action: per Peter Gibson J in *Lawlor v. Gray* [1984] 3 All ER 345 at p. 350;

(xv) In preventing such contradiction of the previous judgment, there is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of *res judicata*, ie the doctrine of estoppel *per rem judicatum*;

(xvi) Our Federal Court prefers the aforesaid contrary view, which represents a correct, even though broader, approach to the scope of issue estoppel and is warranted by the weight of authorities being completely in accord or resonant with the

A rationales behind the doctrine of *res judicata*, particularly the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and the expanding resources of the courts being found always
B one step behind the resulting increase in litigation;

(xvii) *Res judicata* for this purpose is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject
C matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them: per Somervell LJ in *Greenhalgh v. Mallard* [1947] 2 All ER 255 at p. 257; and quoted with approval in the Privy Council in
D *Yat Tung Investment Co. v. Dae Heng Bank & Anor* [1975] AC 581; [1975] 2 WLR 690. (See also *SCF Finance Co. Ltd v. Masri & Anor (No 3)* [1987] QB 1028; [1987] 1 All ER 194 CA; *Bell v. Holmes* [1956] 3 All ER 449; [1956] 1 WLR 1359; and *Hoystead v. Taxation Commissioner* [1962] AC
E 155);

(xviii) The words 'exercising reasonable diligence' in *Henderson, supra*:

(a) necessitate a mental exercise of making a finding as to
F whether there was diligence, or reasonable diligence, in the earlier failure to bring in at the previous trial, the issues which should have been brought in the earlier action and which were not, or in asserting all other causes of action arising out of the same facts in the
G earlier action and which were not;

(b) ought to be understood as a gentle rebuke for the failure aforesaid despite the fact that the party had the opportunity of bringing forward all such issues or
H asserting all such causes of action; and

(c) are not meant to impose a pre-condition for applying the doctrine of *res judicata*, but are meant to say that the non-bringing of the issues would count in any event
I irrespective of whether the failure was or was not deliberate or due to inadvertence or negligence; and

(xix) The court has the inherent jurisdiction to dismiss an action by applying the doctrine of *res judicata* against a party even if it has not been pleaded, as estoppel is based on a question of public policy, and there should be finality in litigation: *Superintendent of Pudu Prison v. Sim Kie Chong* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256, per Abdoolcader SCJ (as he then was).

[19] Where the wording of the earlier originating motion and the content of the supporting affidavit, and the statement of claim in the later action, reveal identical causes of action claiming only one relief in substance, and all the rights and liabilities of both parties have merged into the judgment delivered in the originating motion and the judgment was confirmed by the Supreme Court, it is final, and represents a classical case for the application of the doctrine of *res judicata* by way of a cause of action estoppel: see *Asia Commercial Finance, supra.*

[20] The plea of *res judicata,* however, does not apply where:

(i) the former application had been dismissed on a mere technical defect in the proceedings eg, failure to produce the statement of accounts under s. 21 of the Moneylenders Ordinance (now Act) 1951 and there had been no judicial determination of the matter directly and substantially in the issue between the parties: *Andavan, supra;*

(ii) the former suit between the parties was for the same subject matter and upon the same cause of action, but the matter directly and substantially in issue was never finally decided: *Lee Sem Yoong, supra*; and

(iii) the issue to be decided was different from that previously decided: *Re Lim Leng Cheak, Dec'd, supra.*

[21] In considering the authorities cited for the association, I am of the view that the plaintiff's reliance on the judgment of Ajaib Singh J (later SCJ) in *Florence Bailes, supra*, in the High Court is unsustainable, because the *ratio decidendi* there ie that where the plea of *res judicata* had not been pleaded by the defendant, it could not be raised as a preliminary objection to the hearing of the plaintiff's suit, is no longer good law as it has now been overruled, in view of the decision of the Supreme Court in *Sim Kie Chong, supra,* to the contrary. In any event, in the instant appeal, the plea of *res judicata* has been clearly pleaded.

[22] I shall now revert to the fundamental facts in the instant appeal.

[23] In the Magistrate's Court, the association's prayer for vacant possession is against the member as its tenant. This clearly means that the association's claim is based on the association's capacity as landlord ie owner of the land when it issued the notice to the member. Hence, the finding by the Magistrate's Court that the notice was bad in law and had no legal effect is, in view of the withdrawal of the appeal by the association, final, conclusive and binding on the association and the member.

[24] In the High Court, the association's counterclaim is founded on title to the land so as to recover vacant possession thereof against the member, clearly in the member's capacity as tenant. Without further ado, the association is relying on the same notice.

[25] Hence, there is absolutely no doubt that in the Magistrate's Court and the High Court, the following issues are identical:

(i) Prayer for vacant possession of the land;

(ii) The notice to the member to deliver vacant possession; and

(iii) The invalidity of the notice.

[26] That being the case, the member's plea of *res judicata* is well conceived and justified, being within the scope of the principles set out in *Asia Commercial Finance, supra,* generally, and enumerated in para [17] (1), (2), (10), (13), (14), (15), (16) and (17) the same notice. That plea ought to have been upheld by the learned trial judge.

Conclusion

[27] The learned trial judge had erred in holding that the doctrine of *res judicata* was inapplicable. That was an error of law. The question for determination is therefore answered in the negative.

[28] The member's appeal against the order of vacant possession is allowed. The association's counterclaim for vacant possession based on the same notice is dismissed. The whole of the order of the learned trial judge in relation to vacant possession is set aside. Having regard to the above factual background, we make no order as to costs, here and below. Deposit to be refunded to the member.

[29] For the avoidance of doubt, it must be immediately emphasised that the association as owner of the land is at liberty and indeed entitled to issue to the member a new notice to quit, for the purpose of enforcing its rights as the owner thereof. However, at this stage, I express no opinion on the merits or otherwise of the owner's subsequent action, which the association may be inclined to commence against the member.

[30] My learned brothers Abu Samah bin Nordin and Sulaiman bin Daud, JJCA have read this judgment in draft and have expressed their agreement for it to be the judgment of the court.